No. 12374.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT L. CANNON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts.

This is an appeal from a judgment of conviction of the appellant, Robert L. Cannon, on an indictment charging violation of the Selective Service Act of 1948 for failure to register thereunder.

The trial was by jury that found appellant guilty and as a result the Court sentenced him to three years imprisonment.

This Court has jurisdiction under the provisions of 28 U. S. C. 1281 and 1294(1), 18 U. S. C. 3732 and Rule 37-A, Rules of Criminal Procedure for the District Courts of the United States.

The records of the proceedings have been printed, pursuant to Rule 19 of this Court.

The Statute Involved.

The Selective Service Act of 1948 (62 Stat. 604, 50 U. S. C. Appx. 98, 11 F. C. A. Title 50, Appx. 97) calling for the conscription of an army is involved. The specific section concerned, Section 3, provides:

> "Except as otherwise provided in this title (this appendix), it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and places or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

Statement of the Case.

Facts.

Appellant was born January 19, 1926, in Oakland, California [Tr. p. 38].

He refused to register under the Selective Service Act of 1948, and, on September 5, 1948, wrote his Draft Board, located at 1206 South Santee Street, Los Angeles, giving them his address and stating, in part, as follows:

> "This is to notify you that I am refusing to register for the draft. My conscience, nurtured in the Christian doctrine of love, non-violence, and forgiveness will not permit me to align myself with the Selective Service system, which I consider unjust and un-Christian.
>
> Signed, "Robert L. Cannon, Age, 22 years."
>
> [Tr. p. 40.]

Again, on September 27, 1948, he wrote a letter to Walter H. Henderson, Director of Selective Service, 1209 Eighth Street, Sacramento 14, California, which read in part as follows:

> "Trank you for your letter and the advice rendered. I have no intention, however, of altering my position, *i. e.*, of refusing to register for the draft. I am quite aware of the possible consequences of my action. But as a Christian who believes it mandatory to put into daily practice the teachings of Jesus, I agree with Paul, who says we ought to obey God rather than man.
>
> "Thank you again.
>
> "in His Service,
> "Signed Robert L. Cannon."

[Tr. p. 44.]

Again, on January 5, 1949, appellant made a statement to Henry C. Johnson and Joseph B. Backus, Special Agents of the Federal Bureau of Investigation, wherein he stated in part as follows:

> "I feel that the Selective Service Act of 1948 is unjust and un-Christian and for that reason I refuse to register, although I realize that I am one of the persons whom the law requires to register." [Tr. p. 43.]

After the prosecution rested its case, appellant took the stand and testified in effect that he did not register because:

> "I consider the Selective Service Act an immoral act because it is designed to train people in the art of killing other people. Because I claim allegiance to God, as revealed through Jesus Christ, I felt that I couldn't align myself with any part of it, at any

step, and that I could not register, and that I owe my higher allegiance to the will and purpose of God, as I understand it so far." [Tr. p. 46.]

After appellant was cross-examined by the United States Attorney, the following stipulation was entered into in the following manner:

"Mr. Randles: That is all, Mr. Cannon. Mr. Johnson, I have other witnesses here who would simply be corroborative of the defendant's purpose, habits and characteristics. I doubt if they can add anything to the issues here involved. In the interests of saving time, if you will stipulate that he did not register because of his exercise of his religion, I will rest.

Mr. Johnson: Well, do you say these particular witnesses would give testimony as to his good character?

Mr. Randles: Character, as to his habits, his religious habits.

Mr. Johnson: I am not sure that that would be any particular issue in this case.

Mr. Randles: That is why I am willing—if you will stipulate that he did not register because of his religious convictions, I will not call them.

Mr. Johnson: I think the government is prepared to stipulate that he might not have registered because of his religious convictions.

Mr. Randles: Thank you. That is all.

The Court: Do I understand the stipulation is that the reason why the defendant did not register and has not registered under the Selective Service Act of 1948 was because of his religious beliefs and convictions?

Mr. Randles: Right.

Mr. Johnson: Yes, your Honor.

The Court: Very well. The jury will so understand." [Tr. pp. 49 and 50.]

Facts as to the Instructions.

At the conclusion of taking of evidence and a short recess, the following took place:

"Mr. Randles: My objection was, your Honor, to instruction H. I think that is too broad.

The Court: It is your view that the defendant's religious training and belief is an issue in the case?

Mr. Randles: Yes.

The Court: I take it that it is the defendant's position that the law as applied to him is unconstitutional because it, as applied to him, is an Act which prohibits the free exercise by him of his religious beliefs?

Mr. Randles: That is right.

The Court: And the record may so show, and the trial court intends it to be the defendant's position throughout the case that the statute as applied to this defendant would amount to an unconstitutional deprivation of his free exercise of religion and, as such, would violate the First Amendment to the Constitution.

Mr. Randles: Yes.

The Court: I believe that it will be sufficient to preserve the point throughout the case." [Tr. pp. 51 to 53.]

* * * * * * * *

"The Court: I expect to instruct the jury that this statute as applied to the defendant is not an unconstitional deprivation of the free exercise of religion.

Mr. Johnson: That would, of course, remove our objection to No. 1.

The Court: The defendant, I take it, wants an instruction along those lines so the record will be clear that the constitutional question is in the case.

Mr. Randles: Yes, your Honor.

The Court: Are you ready to proceed with the argument now?

Mr. Johnson: Yes, your Honor." [Tr. pp. 53 and 54.]

Among other instructions, the Court gave instruction 14-A, set forth in full as follows:

"The First Amendment to the Federal Constitution declares that:

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

"The defendant's religious beliefs are within the protection of the First Amendment, but the mere requirement of registration under the Selective Service Act of 1948 does not unconstitutionally infringe the free exercise by the defendant of his religious beliefs. The United States has the constitutional power to require the registration of all male citizens between the ages of eighteen and twenty-six, as the Selective Service Act of 1948 provides, and the exercise of such power in accordance with the Act does not constitute an abridgement of the freedom of religion of any person." [Tr. p. 60.]

and 14-B a portion of which is as follows:

"In the words of the late Mr. Justice Cardozo of the United States Supreme Court:

'Never in our history has the notion been accepted . . . that acts . . . indirectly related to service in the camp or field are so tied to practice of religion as to be exempt, in law or in morals, from regulation by the state . . .

'Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.' " [Tr. pp. 60 and 61.]

Issues.

1. Did the Court err when he instructed the jury as set forth above in instruction 14-A and particularly as follows:

". . . but the mere requirement of registration under the Selective Service Act of 1948 does not unconstitutionally infringe the free exercise by the defendant of his religious beliefs."

2. Did the Court err when he refused to give the proffered instructions, by appellant, No. 15, and which is as follows:

"The Court further instructs you that because of the First Amendment of the Constitution of the

United States, which, as heretofore you have been instructed, reads in part as follows:

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,'

and it having been stipulated that this defendant's failure to register was due to the exercise of his religious motives, you are instructed that so far as this defendant is concerned, the Selective Service Act of 1948 is unconstitutional and you should bring in a verdict of not guilty."

3. Did the Court err when he refused to give appellant's proffered instruction No. 14, reading in part as follows:

"You are instructed that when a matter has been stipulated to by counsel representing the Government and the defendant, it is no longer an issue in this case. In that connection, I would instruct that it has been stipulated to: First, that the defendant did not register under the Selective Service Act of 1948, and it has been further stipulated that his non-registration was because of his exercise of his religious convictions."

We believe these are the issues.

Law of the Case.

The First Amendment of the Constitution of the United States, Article I, provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Argument.

With millions of our school children daily standing and orally pledging allegiance to the flag which is the emblem of the Constitution;

With thousands of Courts being opened daily with Judges, Court officers and litigants standing reverently while the bailiff vocally pays homage to the flag, the emblem of the Constitution;

With hundreds of prospective lawyers and Judges daily raising their right hands and taking a solemn oath to support and defend the Constitution;

With the law requiring that even a prospective Executor or Administrator, charged with no greater duty than to close the business affairs of a dead man, must solemnly swear to support the Constitution of the United States—and they all refer to the same Constitution;

It would seem like carrying the proverbial coals to Newcastle to admonish this Court that the Constitution should not be ignored or, putting it the other way, its provisions should be enforced.

We have read and re-read, with growing respect for the ability of the distinguished lawyers who prepared it, the brief filed in the case of *Richter v. The United States,* filed in this Court and bearing number 12282, and assume this Court is thoroughly familiar with the arguments and authorities therein set forth. Possibly, the only material difference in the case at bar and the one above referred to is the fact that in the case at bar we believe all the material facts are covered by stipulation made in open Court and under the intellgent guidance of the trial judge,

who, judicially, sensed the real issue and made it clear and easy to present to this Court.

At this point, may we stop and pay tribute to the thoughtful attention and judicial eagerness to be fair and kind that was displayed by the trial court. The only cruel thing appearing in the record is the sentence of three years he pronounced on the appellant, who was for the first time in his life found guilty of any crime—a student in one of our universities, preparing to be a minister of religion and one of whom the trial said, at the time of sentence: "He is not a criminal at all." (This statement does not appear in the transcript for it came up just preceding the sentence and on the hearing for defendant's plea for probation which was denied.)

We think the fundamental issue is well expressed in the opinion in the *Barnett* case (*Board of Education v. Barnett,* 319 U. S. 624), at page 638:

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections,"

and, following that principle, it is necessary for the Court to presume legislation unconstitutional whenever it encroaches on these basic rights.

One of the basic reasons for this is that in our democratic process minorities find little protection because of political impotence unless there is protection by the Courts from oppressive operation of the majority will.

(Sources and Limits of Religious Freedom—Summers, 41 Illinois Law Review 53).

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"It is necessary for the court to presume legislation unconstitutional not only when it is discriminatory on on its face (Karematsu v. U. S., 323 U. S. 214, 216) and when it may appear to the court that the primary motive was to discriminate against a particular minority (Example: Statutes aimed at parochial schools, Pierce v. Society of Sisters, 262 U. S. 390) but also where legislation is apparently enacted in good faith but necessarily results in oppression of a minority because the group does not conduct itself in the customary manner. A school flag salute rule may have been well intended but it was a violation of a group's religious beliefs because it represented to them the bowing before a graven image.

"(Barnett case.) Requiring a peddler's license would seem proper on its face but it was declared invalid because of placing a discriminatory burden on the religious practices of Jehovah Witnesses." (*Murdock v. Pennsylvania,* 319 U. S. 105, 109.)

Here the legislation involved was made the law of the land by a majority of those in power, but as to this defendant the operation of it became an unconstitutional limitation upon his basic right to the exercise of his religion.

When the Court has found it necessary to limit the fundamental freedoms of the Bill of Rights, it has used what has been referred to as the clear and present danger doctrine. This doctrine has been applied not only to the freedom of speech and press cases, but also in the freedom of religion cases. It is expressed in

Bridges v. California, 314 U. S. 252.

> "What finally emerges from the clear and present danger cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterance can be punished . . . for the First Amendment does not speak equivocally."

The Court has used this doctrine in declaring laws unconstitutional which would be apparently valid, such as limiting the distribution of handbills in order to keep the streets clean (*Cantwell v. Connecticut,* 310 U. S. 296), the requirement that children should salute the flag when attending school (*Barnett* case, already cited).

This is true even though in the case at bar the defendant's beliefs lead him to actions that are peculiar as judged by majority standards. (Dissent—*Jones v. City of Opelika,* 316 U. S. 584):

> "Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be."

In the case at bar, then, whose rights would be impinged upon, or where is there any clear and present danger rule to be considered which would justify the denial of this appellant his constitutional rights?

If it be claimed the military must know for statistical purposes who the young men are and where they are they might be available, that end has been supplied by the defendant, who, voluntarily, gave to his Draft Board his name, age and residence and the further information that his conscience would not permit him to register. Who, then was injured?

The foregoing makes it manifest that appellant did not try to *evade* the law.

It will be remembered that he was charged with having failed to register, but, under the regulations, the duty was on the Draft Board to so do when they were apprized of appellant's position.

We quote regulation 613.13 (13 Fed. Reg. 4536) as follows:

> "'*Regulation 613.13:* If the registrant is unable or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word 'Registrar' beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if such registrant had signed his Registration Card (SSS Form No. 1), *and such registrant shall thereby be registered.*" (Italics added.)

As was urged in the *Richter* brief:

> "Appellant was entitled to rely on this regulation. Since, upon his refusal to sign the registration card, it became the duty of the registrar to sign for him and thereupon he 'shall thereby be registered,' it is

not proper under the doctrine of *Connally v. General Construction Co.,* 269 U. S. 385, 391 and *U. S. v. Cohen Grocery Co.,* 255 U. S. 81, to hold appellant criminally liable.

"After all, what is desired under the Act is the *registration* of potential draftees, not the prosecution of them.

"The point is emphasized by a consideration of Regulation 642.31:

" '*Regulation 642.31* (15 Fed. Reg. 5484(a)): Provided they are required and have not already been accomplished, the following steps shall be taken in connection with every man who has registered or who is required to register under the provisions of Title I of Selective Service Act of 1948 (50 App. 98) *immediately upon his reporting to or being brought before a local board or* immediately upon his being taken into custody or his being placed in confinement:

" '(1) He shall be registered. (Here follow various specific directives, including):

'(5) (b) If such man is unable or refuses to fill out any form in the manner required by paragraph (a) of this section, such form shall be filled out by a member or clerk of a local board . . . from information gained by interviewing the delinquent and from other sources.

'(c) If the signature of such man is required upon any form after it is filled out and he is unable or refuses to sign his name or make his mark upon any such form, a member or clerk of a local board . . . shall sign such man's name and indicate that he has done so by signing his own name beneath the name of such man.'

"It is therefore respectfully submitted that, the above regulations, considered together with Regulation 613.11, demonstrate that appellant need have done no more under the Act and he could be guilty of no crime since it was the duty of the Board to register him upon his notifying them of his position.

"Regulation 613.11 provides:

'(a) All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) *must* be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card, except when the registrant signs the completed card.'

"If, despite these regulations, appellant was required to do more, the statute (Section 12(a) of the Act) and the regulations are void for vagueness."

We cannot review the foregoing authorities without being conscious that the case here presents a problem that does become perplexing to judges and lawyers alike. However, may we most earnestly contend that the stipulation, together with the First Amendment of the Constitution, leads to no logical conclusion but that the appellant was illegally convicted.

To those who point with alarm to the following facts:

(a) We are the richest nation in the world;

(b) Hungry and selfish and unreligious nations covet our wheatfields, oil wells, sky-scrapers, good roads and automobiles, recognizing the constitutional right of this appellant might cause other young men to claim their con-

stitutional heritage. This might undermine our military might and result in our falling prey to some aggressor nation.

To the above, we would ask how would we become in 160 years so strong and so rich that we have become the envy of other nations? The answer we assume would be because we have, under our Constitution, had such a good Government. And the next question might follow: After having gained so much under our Constitution, should we now through fear of losing our inheritance, ignore it or any of its provisions? As we see it, the only logical or legal answer is no.

If the simple language of the First Amendment is dangerous or vicious to our future, ought we not to amend it or revoke it? But let's not have us daily professing our holy regard to it and then when its provisions are raised, ignore it.

Finally, the Constitution framers did not *define religion.* They did *protect it.* This was no vain act or thoughtless gesture, for before they got through they provided for a trial by *jury* and left it in the lap of a jury to say what was and what was not religion.

In refusing to define religion, the framers, no doubt, thought that time might change people's concepts of religion.

The time might come when a man might kill, steal, lie or break any, or all, of the ten Mosaic commandments and might even use modern science to make an atomic bomb and kill 100,000 men, women and children at one time and when his act was questioned *claim* he was exercising his guaranteed constitutional religious liberty;

They might even have looked forth to a time when a man might *refuse* to kill his fellowmen at the order of a third person and when questioned, set up his constitutional guaranteed religious rights;

Or they might even have looked forward to a time when a man would refuse to sign a draft card because he knew it was a part of a war program, which the free exercise of his religion would prohibit him from doing.

In each of the foregoing cases, the constitutional fathers must have thought it was wise to leave the definition of religion in the hands of a jury who would be sensitive to the fact of what religion meant or was in the day in which they live.

After 160 years have passed, is an individual Judge to question their wisdom or substitute his own ideas of what they should have done, or instruct a jury that the defendant's religious rights have not been infringed upon? If so, we pass the responsibility of letting such a judgment stand on to this Court.

Respectfully submitted,

James D. Randles,

Attorney for Appellant.